SUPREME COURT, U. S. NO. [redacted] 149

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAYNE DYKE, ET AL,
Petitioners,

vs.

TAYLOR IMPLEMENT MANUFACTURING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1966

NO. 1378

WAYNE DYKE, ET AL,
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vs.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 410 S.W. 2d 881 (1967).

JURISDICTION

The basis of this Court's jurisdiction, as asserted by petitioners, is 28 U.S.C. § 1257; however, for the reasons hereinafter set out respondent avers that the Court lacks jurisdiction to consider Questions 3 and 4 raised in the "Petition for Writ of Certiorari to the Supreme Court of Tennessee".

QUESTIONS PRESENTED

1. Was the search of the automobile in which petitioners were riding at the time of their arrest and the seizure of a rifle found therein reasonable in view of all the facts developed in the record?

2. If evidence was improperly admitted by the trial court, is there other sufficient evidence in the record to justify the findings of the trial court?

3. Were Questions 3 and 4 presented in the "Petition for Writ of Certiorari to the Supreme Court of Tennessee" properly raised in the state court proceedings or considered and determined by the state court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the State of Tennessee:

Article 1, Section 6. "That the right of trial by jury shall remain inviolate . . . ."

28 U.S.C. §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

Respondent is satisfied with the statement of counsel for petitioners except as follows:

(1) The petitioners were indicted in Monroe County, Tennessee.

(2) There was ample evidence to justify the Chancellor's decree in addition to the rifle and ammunition found in the automobile, which linked the petitioners to the shooting in the adjoining County, thereby violating the Court's injunction. Specifically, witnesses Dale Harris and Robert Ellis identified the automobile in which petitioners were arrested shortly after the shooting episode as being the same automobile from which the shot in question was fired (R. 110, 113, 117-121).*

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* As used in this brief, "R" refers to Volume I of the Record prepared by the Supreme Court of Tennessee.

ARGUMENT

(1) THE SEARCH OF THE AUTOMOBILE IN WHICH PETITIONERS WERE RIDING AT THE TIME OF THEIR ARREST AND SEIZURE OF A RIFLE FOUND THEREIN WAS REASONABLE IN VIEW OF ALL THE FACTS DEVELOPED IN THE RECORD.

The petitioners contend that error was committed in allowing certain evidence to be introduced concerning a rifle found in the automobile in which petitioners were riding in contravention of their rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

Conceding for the purpose of discussion that illegally seized evidence cannot be used to convict one charged with a contempt, still this rule would have no application to the facts of this case. The evidence which petitioners charge was illegally obtained relates solely to the rifle. As will be shown, the search which uncovered this weapon was reasonable and therefore not in violation of the constitutional guaranties against unreasonable searches and seizures.

Lloyd Powers, a McMinn County deputy sheriff, testified that on the night of February 25, 1966, he was patrolling in a patrol car when he heard a call come in over a two-way radio from the Sheriff of Monroe County that there had been a shooting in a house in Monroe County and to be on the lookout for an "old-make model car". As Powers drove toward Englewood, Tennessee, a town in McMinn County but near the Monroe County Line, in

response to this call, he met three cars. The first car was "an old model car." Powers turned around and chased this car to see if it was the one that was being sought. Within about one mile he passed the other two cars, but he was not able to catch the first car — "It was running at a high speed, high rate of speed." (Tr. p. 52). Being unable to overtake this car, Powers radioed into the Athens City Police, who stopped the speeding car. Powers arrived before the three occupants, who he identified as the petitioners herein, got out of the car.

While talking to the petitioners at their car, Powers discovered a bullet hole in the back of the car. The driver, petitioner McKinney, stated that the bullet hole had been there for a long period of time. This was obviously contrary to Power's own observation for he testified:

> "At that time we seen the bullet hole was just a fresh hole. Been a fresh hole, see. Wasn't even no rust spot or anything. Fresh hole through the body of the car, and —" (Tr. p. 53).

If the freshly formed bullet hole had not been discovered in the rear of petitioners' automobile, the contention that the subsequent search of the car was unreasonable after the driver had been arrested only for reckless driving might have merit.

However, the undisputed testimony in this case is that the bullet hole in the rear of the car was fresh. Sheriff Calvin Cannon of McMinn County testified as follows:

> "I went out and looked at the automobile and checked it and found that a bullet or— had entered into the trunk of the automobile and picked up the fragment of the bullet. It hit the frame after it

went through and also a tool box and, of course, there was the fresh lead, real bright—" (Tr. p. 59).

Upon cross-examination Sheriff Cannon stated that in his opinion the bullet hole had to have been made that night (Tr. p. 59).

The discovery of the bullet hole was not the result of any unlawful search. Indeed, it is not even a "search" to observe that which is fully disclosed by mere visual observation. *United States v. Lee*, 274 U.S. 559, 563.

Detecting the bullet hole involved no search, but the important thing is that it aroused suspicion in the minds of the officers in view of the information of a shooting episode received shortly before and in view of the fact that the petitioners had attempted to mislead the officers by saying that the hole had been there for a long period of time. More important it showed that the automobile had been involved in a shooting episode recently.

The constitutional guaranties extend only to unreasonable searches. A search without a warrant is reasonable if probable cause exists for it.

> "Probable cause necessarily is often based upon what an officer is told, as well as upon what he perceives through his own senses. It exists where facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302; *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790." *United States v. Roberts*, 90 F. Supp. 718, 720.

The search of the automobile in this case was not based solely upon the officers' information that an old model car had been involved in a shooting in Monroe County, but also upon the officer's efforts to catch a fleeing automobile, the observation of the fresh bullet hole which tended to show that the automobile was recently involved in a shooting episode plus the statement by one of the petitioners that the hole had been there a long time, which fact was obviously contradicted by visual inspection.

Having reasonable cause to believe that a crime had been committed and that the petitioners were involved in its commission, it is submitted, that the subsequent search of the automobile was proper.

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(2) THERE WAS SUFFICIENT EVIDENCE, OTHER THAN THAT ASSERTED TO BE INADMISSABLE, TO JUSTIFY THE FINDINGS OF THE TRIAL COURT.

Assuming arguendo that the evidence which was found in the automobile in which petitioners were riding was improperly admitted, this within itself is not a ground for reversal for punishment for contempt of court. *Bowden v. Bowden*, 198 Tenn. 143, 147; *Sinclair v. United States*, 279 U.S. 749. In the latter case at page 768 this Court said:

"Objections are offered to the admission of certain evidence. In answer, we need only refer to what

was said in *United States v. King*, 7 How. 833, 854, 855, 12 L. ed. 934, 944: 'In some unimportant particulars, the evidence objected to was not admissable. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the case as if it was not in the record.

"Considering the whole record, we think appellants had a patient hearing upon adequately defined issues, with abundant opportunity to put forward all proper defenses and explanations. With, the exception already stated, there is ample evidence to support the judgment; the punishments imposed are not excessive; the court kept within the limits of its reasonable discretion and did nothing which injuriously affected the substantial rights of the parties. Judicial Code, § 269, U.S.C. title 28, § 391."

In this case there is ample evidence to sustain the conviction for contempt other than the evidence alleged by the petitioners to be inadmissible. The Supreme Court of Tennessee in passing on the weight of the evidence expressly so held in its opinion at 410 S.W. 2d 881, 885:

"It is the opinion of this Court that, even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding."

Furthermore, it is well settled that the Supreme Court will not review findings of fact by a state court where there is evidence to support those findings. Accordingly,

the respondent respectfully submits that this Court is bound by the Tennessee Supreme Court's decision in regard to the record containing sufficient evidence, other than that alleged by petitioners to be inadmissible, to support the findings of the Chancellor.

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(3) THE FEDERAL QUESTIONS PERTAINING TO PETITIONERS' RIGHT TO A JURY TRIAL RELIED UPON IN THIS COURT ARE NOT THE SAME AS THOSE RAISED OR CONSIDERED AND DETERMINED IN THE STATE COURT.

The jurisdiction of the Supreme Court in this case is based upon the third section of 28 U.S.C. § 1257; however, under this statute the Supreme Court's review is limited to the specific federal questions that were either properly raised in the state court or actually considered and determined by it. *Whitney v. California*, 274 U.S. 375, 360-363; *Dewey v. Des Moines*, 173 U.S. 193, 197-198.

> "It is well settled that this Court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the State court and had not been by it considered, not being necessarily involved in the determination of the cause." *City Dairy Co. v. Ohio*, 183 U.S. 238, 248.

Upon appeal to the Supreme Court of Tennessee the petitioners made the following assignment of error:

> "1. The Court erred in denying the defendants a trial by jury. See Motion for New Trial, ground No. 2 (Tr. 84). The defendants' answer demanded a trial by jury (Tr. 74). The Court noted and denied the demand for jury trial (Tr. 99). The defendants had a right to trial by jury by reason of Title 40, § 2504, Code of Tennessee (1956); Art. 1, § 6, of the Constitution of the State of Tennessee; and the 7th Amendment to the Constitution of the United States."

Petitioners now contend for the first time that an alleged contemnor is entitled to a jury trial under the Fourteenth Amendment to the United States Constitution where the alleged contemptuous conduct amounts to a felony and where under state law a jury is required in every criminal case in which imprisonment may result. These are very different issues from that embraced in the assignment of errors and argued before the state supreme court.

The Seventh Amendment, cited by petitioners in their first assignment of errors in the state court, preserves the right to a jury trial as it existed at common law in certain cases tried in the federal courts and does not apply to trials in state courts. *Walker v. Sauvinet*, 92 U.S. 90. Indeed, no provision of the Federal Constitution expressly guarantees the right to a trial by jury in any case, criminal or civil, triable in the state courts. Furthermore, "the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that con-

sistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted)" *Fay v. New York*, 332 U.S. 261, 288.

Clearly, petitioners were relying primarily, if not solely, upon the Tennessee Constitution and state statutes in claiming that the Chancellor erred in denying their demand for a jury trial, for the Seventh Amendment was in no way pertinent to the case.

A party is not required to use any particular form of words or phrases in framing the federal question presented before the state court. It is only necessary "that the claim of invalidity and the ground therefor be brought to the attention of the State court with fair precision and in due time, and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In other words, the record must clearly indicate that the party seeking to invoke the jurisdiction of this Court duly sought to rely upon a particular provision of the Constitution or act of Congress. The federal issue upon which a litigant seeks Supreme Court review must have been clearly and positively presented so as to bring it unmistakenly to the attention of the state court; it cannot be left to mere inference. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655. "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature." *Dewey v. Des Moines*, *supra*, p. 199.

The sole federal question raised by petitioners' first assignment of error in the Tennessee Supreme Court related to whether or not under the Seventh Amendment petitioners were entitled to a jury trial in a criminal

contempt case. Indeed, there was no mention of the Sixteenth Amendment in the first assignment of error. The reference to the Seventh Amendment, however, will not support the issues which, for the first time, petitioners seek to raise before this Court. In *Chapin v. Fye*, 179 U.S. 127, the Court held that issues raised in the state proceedings under the Fifth Amendment and Seventh Amendment of the Federal Constitution would not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment.

Considering only the questions before it, the Tennessee Supreme Court properly held that the Seventh Amendment does not require a state to grant jury trials in contempt cases. Since petitioners neither set up in the record the jury issues relating to the Fourteenth Amendment which they now raise or in any way alluded to them, it cannot be said that they were "brought to the attention of the state court with fair precision." Nor can it be said that the state court denied the claims now made by petitioners. "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." *Dewey v. Des Moines*, *supra*, p. 200.

Since the federal jury issues upon which review is now sought were neither raised by petitioners in the state proceedings nor in any way considered or decided by the state court, the Supreme Court lacks jurisdiction to consider them.

(4) PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL UNDER THE FOURTEENTH AMENDMENT.

Petitioners do not indicate which clause of the Fourteenth Amendment they rely upon in regard to the jury questions upon which review is sought.

Assuming for the sake of discussion that the jury questions upon which review is sought were properly raised in the state court, the provisions of the Fourteenth Amendment would not afford petitioners the right to a jury trial in this case.

As previously noted, nothing in the Federal Constitution specifically requires a trial by jury in state courts, and a state can alter or abolish its jury system altogether without doing violence to the Constitution. The due process clause of the Fourteenth Amendment does not make the Sixth and Seventh Amendments applicable to state proceedings. *Fay v. New York, supra.*

Since the Sixth and Seventh Amendments are limitations upon the federal government only and not upon the states, the right to a jury trial cannot be said to be "a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge." *Walker v. Sauvinet, supra*, p. 92.

Furthermore, the equal protection clause of the Fourteenth Amendment does not require uniformity of procedure. The state may classify litigation and make different arrangements for the procedure governing trials within the classes. All that is required by the equality clause is that the classification be reasonable and that the law operates alike upon all members of the class under

similar circumstances and conditions. 16 Am. Jur. 2d, *Constitutional Law*, § 536, pp. 925-926. Thus, it has been held that the equal protection of the laws is not denied by a state statute abridging the right of trial by jury in the courts of a city without making a similar provision for the counties of the state. *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U.S. 474.

The fact, that under Tennessee law an alleged contemnor is not entitled to a jury trial even though he would be entitled to such upon a criminal indictment arising out of the same acts as constituted the alleged contemptuous conduct, does not violate the equal protection clause of the Fourteenth Amendment.

The classification between non-jury trials in contempt proceedings and jury trials for violations of the criminal code of the state is reasonable. It is a classification sanctioned both at common law and under modern practice. *Cheff v. Schnackenbert*, 384 U.S. 373. No where do petitioners suggest that as members of the class of alleged contemnors the Tennessee law regarding the right of jury trial operates differently upon them than upon some other members of the same class. All alleged contemnors are treated equally in the denial of the right of a jury trial.

Petitioners maintain that in *Cheff* the Court equated the right to a jury trial in contempt cases with the nature of the criminal offense constituting the contemptous conduct. While this may be the position expressed by Mr. Justice Douglas in dissenting, respondent respectfully suggests that the majority opinion held merely that, regardless of the nature of the offense, a jury trial must be afforded in contempt cases in the federal courts only where the sentence imposed is greater than six months. Thus, to

apply *Cheff* to the states through the Fourteenth Amendment, as petitioners urge, would not effect the result in this case, for the contempt sentence was limited to 10 days imprisonment and a $50.00 fine, this being the maximum punishment for contempt under Tennessee law. See *Tennessee Code Annotated*, § 23-903.

The fourth question presented in petitioners' brief assumes that the Constitution of the State of Tennessee requires a jury trial in every criminal case in which imprisonment may result. First, it should be noted that a contempt proceeding is only a "quasi-criminal" proceeding. Secondly, the case of *Willard v. State*, 174 Tenn. 645, 130 S.W. 2d 99, relied upon in support of petitioner's contention under the fourth question presented holds ". . . that this constitutional provision (referring to Article 1, Section 6 of the Tennessee Constitution) protects the right of trial by jury *only as it existed at common law* . . . (emphasis supplied)." Thirdly, the Tennessee Supreme Court has ruled that "a defendant was not entitled to a jury trial in contempt proceedings in any Court at common law." *Pass v. State*, 181 Tenn. 613, 618, 184 S.W. 2d 1. Since the fourth question presented involved the interpretation of the state constitution alone, the question is resolved by the judgment of the Tennessee Supreme Court. *Walker v. Sauvinet*, *supra*, p. 92.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 7, 1967

AFFIDAVIT OF SERVICE

I, S. Randolph Ayres, of counsel for the Respondent, being first duly sworn according to law, depose and say:

Pursuant to Rule 33, Paragraph 3(c), of the Supreme Court of the United States, I have this ..... day of July, 1967, served a true and exact copy of the foregoing Brief for Respondent in Opposition upon Bernard Kleiman, 10 South LaSalle Street, Chicago, Illinois, Elliot Bredhoff and Michael Gottesman, 1001 Connecticut Avenue, N.W., Washington, D. C., and George Longshore, of Cooper, Mitch & Crawford, 1025 Bank of Savings Building, Birmingham, Alabama, by depositing same in the United States Post Office or mail box, with first class air mail postage prepaid, addressed to said counsel at their respective addresses.

.....
S. RANDOLPH AYRES

Sworn to and subscribed before me
this ..... day of July, 1967.

.....
Notary Public

My Commission Expires: .....